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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1732

CENTER SCHOOL DISTRICT No. 58, LEROY BARROWS, Superintendent, CHARLES CREWS, President and EVERT ASJES III, WILLIAM B. BRANDT, JOSEPH S. KENTON, J. K. KIDD, and DIANE SMALLEY, Members of the Board of Education of Center School District No. 58,

Petitioners,

vs.

JOHN GIERINGER,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION
On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPINIONS BELOW

Neither the opinion of the United States District Court for the Western District of Missouri nor the opinion of the Court of Appeals for the Eighth Circuit has yet been reported, but are included as Appendices D and B respectively.[1]

1. References to appendices of the Petition are designated (Appendix ....), or (Appendix .... at .....).

JURISDICTION

Judgment of the Court of Appeals for the Eighth Circuit was entered April 20, 1973. Petition for rehearing was denied May 23, 1973. Petition for Certiorari was timely filed, asserting jurisdiction under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

The "Question Raised" as phrased by petitioner (Petition, Page 2) is predicated on a completely erroneous allegation that the "previous written policy agreement" placed a duty on the teacher association, the board and the administration to meet and discuss matters of mutual concern "prior to any public statement being made by either of the entities or a representative thereof". A careful reading of the policy statement (Appendix E) clearly shows that no such requirement existed (see also footnote 3, Point I of Argument).

Respondent believes that the determinative issue is whether a school board's discharge of a teacher in retaliation for his making an oral report to a teachers association meeting, despite the fact that the report caused no disruption of school activities and was substantially correct, violates his First Amendment rights.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions and statutes are set forth in the Petition.

STATEMENT

This case involves the decision of Center School District (herein "District") to terminate the employment of John Gieringer, a physical education instructor. That decision was based on an impromptu report made by Mr. Gieringer to the General Assembly Meeting of the Center Community Teachers Association (herein "CTA").

To understand the controversy, a brief background is required. District receives its revenue from the real and personal property taxes assessed by Jackson County, Missouri. Part of that revenue consisted of payments "in lieu of taxes" by the United States government. From 1955 through 1965, under acts of Congress, the United States paid the county an amount equal to the taxes which would have been paid if the government-owned property had been privately owned. A dispute arose between the United States and the county over the amount due the county for 1966 through 1968. The county filed suit. The dispute was settled and the United States agreed to pay $643,850.00 to cover the "in lieu of tax" contributions for 1966 through 1968 (29-33).[2] The government also agreed that, if the "in lieu of tax" provision (40 U.S.C. § 523) was reenacted, the additional payments commencing in 1969 would be based on an agreed tax valuation of the government property of $4,500,000.00. The school administration reported to the teachers that the settlement was a "one shot" payment (19, 44, 152).

A committee of the CTA then directed Respondent to further investigate the significance of the settlement

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2. References to the appendix filed in the Court of Appeals are designated (.....).

agreement (53). Respondent did so and reported his findings to the committee and to CTA's president (56).

On October 14, 1969, CTA held its General Assembly Meeting (55). The chairman of Respondent's committee was scheduled to make a report but had to leave the meeting early (145-146). Before leaving, he asked Mr. Gieringer to report in his place (145-146). Gieringer spoke for one or two minutes. Although there is some conflict as to the details of what he said, the general tenor is undisputed (47, 56-57, 129). He stated that, in addition to the payments for 1966-68, "there should be or would likely be $170,000.00 in lieu of taxes for the 1969 year". The secretary of the association summarized the report in the association's minutes:

> "John Gerringer [sic] reported that due to a court case over disputed property that a substantial amount of money should come into the district this year and in the next few years." (47).

The Appellate Court found that the report did not result in any disruption of school or classroom activities (Appendix B at A8). The superintendent of schools, one of the defendants in the suit, admitted that he knew of no problems which arose as a result of the Gieringer report except that a number of teachers questioned whether more money was going to come in (174-175, 222). However, a heated discussion arose at a meeting of the Teacher Administration Board committee (herein "TAB"), when the assistant superintendent stated that the CTA had no right to investigate the question and that Gieringer had been lying (59, 148, 158).

Despite the fact that the two prinicpals under whom Gieringer was teaching had given him satisfactory or higher ratings in every department and despite the fact

that neither principal had ever given Mr. Gieringer an oral reprimand or a written statement of unsatisfactory performance, the school board refused to renew his contract. As recognized by the Court of Appeals, "it is clear from the record that this report [to the CTA] served as a catalyst and *that without it no discharge would have occurred.*" (Emphasis added) (Appendix B at A6).

The school district received both the lump sum payment for 1966-68 and a payment of approximately $170,000.00 in each of the years 1969 and 1970, as Gieringer had indicated.

Gieringer brought an action under 42 U.S.C. §§ 1981 and 1983 seeking declaratory judgment, injunctive relief, and damages for alleged violation of his First and Fourteenth Amendment rights. Jurisdiction of the District Court was based on 28 U.S.C. § 1343 (3) and (4). The District Court entered judgment for defendants (Appendix D).

On appeal, the Court of Appeals for the Eighth Circuit reversed, ordering reinstatement and awarding back pay (Appendix B).

ARGUMENT

I

The Court of Appeals Correctly Applied the Principles Established by Pickering v. Board of Education

The present case is clearly controlled by this court's decision in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). The Court of Appeals correctly held that the principles established in that case required Gieringer's reinstatement.

The parallel to *Pickering* is striking. Both cases involve statements on matters of public concern. Both statements were made outside the classroom. Neither statement interfered with the teacher's working relationships or his teaching performance. Neither involved any deliberate misrepresentation. Neither involved any failure to follow "narrowly drawn grievance procedures."[3]

Petitioner contends that the decision below conflicts with *Pickering*. The best response is the language of the Court of Appeals.

> "Nothing in the evidence suggests that Gieringer's report in any way interfered with his teaching. It does not appear to have jeopardized his relationship

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3. Petitioners argue that the TAB Policy Statement (Appendix E) is such a procedure. Even the most cursory examination of the document reveals that it is nothing of the sort. The Policy Statement contains many vague statements relating to the best ways to "enhance the optimum development of the educational program" and to "facilitate good faith relationships between" teachers and administration. Nothing in the document requires a teacher to submit any information to the TAB prior to communicating it to the teachers (62, 120). Furthermore the administration without consulting with TAB or CTA had already announced its version of the settlement agreement.

with fellow teachers with whom he had to work closely. It did not result in disruption of the district's operations. While the report evidenced optimism that the agreement might provide enough money to support a salary increase for teachers, it was couched in possibilities. There is no evidence that Gieringer deliberately sought to misrepresent his conversations with the county attorney in order to embarrass the administration. Gieringer's inference, from the background circumstances reported to him, that the school board would continue to receive federal monies was at least as permissible as the pessimistic pronouncements by the administration that any amount received from the federal government would represent only a 'one shot' payment.

In short, none of the indicia recounted in Pickering, which would take expression out of the sphere of protected activity, appear in this case." (Appendix B at A7-A8) (Emphasis added).

Ironically, Gieringer was discharged for an accurate prediction. The administration's statements that any amount from the government would represent only a "one shot" payment prove to be wrong. The District *did* receive approximately $170,000.00 in each of the two years following the Gieringer report. Whether Gieringer said that there "would likely be $170,000.00 in lieu of taxes for the 1969 year" or only that "a substantial amount of money should come into the district this year and in the next few years" is immaterial. In either event, his statement was substantially more accurate than the administration's statement that *no* additional money would be received.

II

The Decision Below Is Entirely Consistent With the Decision of the Court of Appeals for the Second Circuit in Simard v. Board of Education

There is no conflict between the decision of the court below and the decision of the Court of Appeals for the Second Circuit in *Simard* v. *Board of Education*, 473 F.2d 988 (2nd Cir. 1973). *Simard* dealt with a different problem and a different factual situation. The court in *Simard* found that the failure to renew Simard's contract was not connected in any way with his teacher union activities. *Id.* at 995-996. In sharp contrast, the Appellate Court in the present case found that Gieringer's report to the teacher association "served as a catalyst and that without it no discharge would have occurred." (Appendix B at A6).

The insubordinate conduct for which Mr. Simard was discharged was radically different from Mr. Gieringer's peaceful speech to his fellow teachers at a teacher association meeting. The principal of Simard's school encountered him in the school office at a time when Simard was scheduled to be teaching a class. Three times the principal asked Simard to return to the class but Simard refused. He told the principal that he had no intention of returning to the class until after he had a cup of coffee and checked his mail. He told the principal "to write him another letter". *Simard* v. *Board of Education*, *supra* at 996, n. 13. Thus, Simard directly refused to obey a lawful order to perform the job for which he was being paid.

The speech for which Gieringer was discharged was a teacher association activity. The Court of Appeals found that the speech concerned a matter of public interest, that no evidence indicated that it interfered with Gieringer's teaching activities, that it neither jeopardized his relation-

ship with his fellow teachers nor resulted in any disruption of the school district's operations, and that it represented an interpretation of the facts that "was at least as permissible as the pessimistic announcements by the [school] administration." (Appendix B at A8).

The present case and *Simard* simply do not deal with the same problem. The Second Circuit upheld Simard's discharge after finding that it was motivated solely by his blatant insubordination and not by his teacher association activities. The Eighth Circuit struck down Mr. Gieringer's discharge when it found that Gieringer had been discharged because of a speech made in a public teacher association meeting. There is no conflict.

III

This Court Should Not Review the Concurrent Findings of Fact of the Two Courts Below

This court has repeatedly stated that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error". *Berenyi* v. *Immigration Service*, 385 U.S. 630, 635 (1967); *Allen* v. *Trust Company*, 326 U.S. 630 (1946).

Petitioner's suggestion that the Court of Appeals ignored evidence of Mr. Gieringer's conduct in prior years is a thinly disguised request that this court review such a concurrent finding.

The Court of Appeals expressly ruled that Mr. Gieringer was discharged *because of his report to the CTA*. It did not ignore Mr. Gieringer's prior record. It considered that record yet found that the school district had been motivated by Gieringer's report—not his record. The court said:

> "In support of this action, the appellees argue that Gieringer's dismissal rested upon the entire history of his inability to get along with his superiors rather than simply upon the report which he had made to the Teachers Association. The record serves to belie this argument. The school board's transfer of Gieringer in 1969 to different schools and a different position eliminated earlier frictions and cleared the air. Thereafter, the only criticism of Gieringer's performance as a teacher emanated from his report given to the Teachers Association." (Appendix B at A6).

The District Court apparently agreed. That court held that Mr. Gieringer's speech was unprotected activity (Appendix D at A16). No such holding would have been necessary unless the trial court concluded that *the speech caused Gieringer's discharge.*

Petitioner gives no reasons for believing these findings to be false. There are no such reasons.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

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